



JUDICIARY OF
ENGLAND AND WALES

The Queen oao Hurley and Moore v Secretary of State for Business, Innovation & Skills

High Court

17 February 2012

SUMMARY TO ASSIST THE MEDIA

The High Court (Lord Justice Elias and Mr Justice King) today dismissed an application by two students to quash the Government's regulations increasing tuition fees on the grounds they are unlawful. It did, however, grant a declaration that the Secretary of State for Business, Innovation and Skills had not fully complied with her public sector equality duties.

Introduction

The claimants are students in the lower sixth form who wish to go to University. They seek by way of judicial review to challenge the decision to allow institutes of higher education (hereinafter "universities") to increase fees up to £9000 per year. The increases were effected by two regulations, the Higher Education (Basic Amount) Regulations 2010 (SI 2010/3021), and the Higher Education (Higher Amount) Regulations 2010 (SI 2010/3020) (collectively referred to as "the 2010 Regulations"). The claimants seek to have these regulations quashed. (para 1) The regulations were part of a detailed package of measures, introduced following the review by Lord Browne into funding Higher Education. Some of these measures were specifically targeted at attracting those from socially disadvantaged backgrounds into higher education.

Grounds of challenge

The claimants contend that the 2010 Regulations are unlawful on each of the following grounds:

- (1) The decision to increase the permitted limit for the basic and higher amounts is contrary to the right to education conferred by Article 2 of Protocol 1 of the European Convention on Human Rights ("A2/P1"); alternatively is contrary to that provision when read with Article 14 of the Convention. The thrust of the argument is that the new rules will have a chilling effect on the ability of those from disadvantaged social backgrounds to take up university places.
- (2) The decision was made in breach of the requirements of the public sector equality duties ("the PSEDs") imposed by the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995.

Background

The background to the Government's decision to increase tuition fees is set out in paragraphs 7 - 25.

First ground of challenge

The Court considers the ECHR issue at paragraphs 26 - 65. The Court concluded that there had been no disproportionate interference with the A2/P1 right so as to impair the essence of the right. The court was not satisfied that there was a disproportionate impact on those from socially disadvantaged backgrounds, taking the measures as a whole. Even if there was, any such impact was justified.

In rejecting this ground, Lord Justice Elias said:

"... I pay particular regard to the fact that this is an area of macro-economic judgment, where decisions have to be taken about prioritising public resources. If charging fees of this magnitude is unlawful, public resources will have to be provided, at the expense of other competing and pressing interests. Moreover, there is an inevitable tension between widening higher education so as to catch everyone who can benefit from it whilst maintaining the highest standards, and funding that increase. In my judgment, significant leeway must be given to the democratically accountable Secretary of State as to how the objective of providing sustainable and quality higher education can be best secured." (para 63)

He went on to say:

"In my judgment, the objective was a legitimate one and the means of achieving that objective were justified. The Secretary of State considered that in order to provide the secure funding for the expanding sector of higher education, fees would need to be charged. He had regard to the potential impact on the poorer households and took a series of steps actively to address that problem. Various other proposals were considered and cogent reasons were given for rejecting them. I do not think that in those circumstances the court could properly find that the decision was unjustified." (para 65)

Second ground of challenge

The Court considers the Public Sector Equality Duty issue at paragraphs 66 - 99.

Lord Justice Elias concluded that whilst there had been substantial compliance with the duties, the Secretary of State had not focused sufficiently on the full range of those duties::

"... the Secretary of State did not carry out the rigorous attention to the PSEDs which he was obliged to do. Having said that, I am satisfied that he did give proper consideration to those particular aspects of the duty which related to the principle of levying fees and the amounts of those fees, and by seeking a quashing of the regulations, the claimants have focused on that aspect of the policy." (para 97)

In the light of this conclusion he went on to reject the application to quash the regulation:

"In my view, taking into account all these considerations, I do not consider that it would be a proportionate remedy to quash the regulations themselves. Whilst I have come to the conclusion that the Secretary of State did not give the rigorous attention required to the package of measures overall, and to that extent the breach is not simply technical, I am satisfied that the particular decision to fix the fees at the level reflected in the regulations was the subject of an appropriate analysis. Moreover, all the parties affected by these decisions – Government, universities and students – have been making plans on the assumption that the fees would be charged. It would cause administrative chaos, and would inevitably have significant economic implications, if the

regulations were now to be quashed. I emphasise that those considerations would not of themselves begin to justify a refusal to quash the orders if the breach was sufficiently significant. It will be a very rare case, I suspect, where a substantial breach of the PSEDs would not lead to a quashing of the relevant decision, however inconvenient that might be. But in circumstances where, for reasons I have given, there has been very substantial compliance in fact, and an adequate analysis of implications on protected groups of the fee structure itself, these considerations reinforce my very clear conclusion that quashing the orders would not be appropriate." (para 99)

Conclusion

Lord Justice Elias concluded:

"I would grant a declaration to the effect that the Secretary of State failed fully to carry out his PSEDs before implementing the 2010 regulations under challenge. I would not, however, quash the regulations." (para 100)

Mr Justice King agreed with Lord Justice Elias' judgment (paras 101 – 103)

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This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.